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No. 99-729

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF WEST HAVEN, WEST HAVEN PLANNING AND ZONING COMMISSION, DONALD LEWIS and DAVID SALDIBAR,

Petitioners,

v.

GEORGE THOMAS, BARBARA THOMAS and JOHN FINNELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

Petitioners have invoked 28 U.S.C. § 1257 as the basis for this Court's jurisdiction to review the judgment of the Connecticut Supreme Court. This Court lacks jurisdiction, however, because petitioners failed properly to raise below the issue they now ask this Court to decide.

STATEMENT OF THE CASE

Respondents hereby incorporate the facts of this case as set forth within the decision of the Connecticut Supreme Court included within the petitioners' petition for certiorari. *See* Pet. App. at 1. Respondents, however, point out the following as particularly significant.

There were two hearings conducted by the petitioners which subjected respondents to rules and a process not required of other zone change applicants. During these two hearings the individual petitioners Lewis and Saldibar exhibited extreme hostility and predetermination. The first hearing occurred on May 13, 1986, at which time the petitioners insisted that in order for respondents to present their zone change request they also had to include a site plan application, despite being informed by the city's planner that no such requirement existed. Pet. App. at 12. At that hearing, both individual petitioners fully participated in the hearing and voting. Petitioner Lewis made the motion to deny the application and went out of his way to explain his motion to the rest of the commission so that they knew they were voting to deny with prejudice, meaning respondents would be barred from appearing before the commission for at least one year. Pet. App. at 14. At the second hearing on June 23, 1987 Lewis and Saldibar again exhibited extreme animosity, with

Lewis becoming so heated that Saldibar needed to calm him down. *See* Pet. App. at 15 n.19.

Respondents appealed both denials of their application to the Connecticut Superior Court. Both appeals resulted in judgment against *the entire* West Haven Planning and Zoning Commission for predetermination and bias based on the actions of Lewis and Saldibar and the denial of the application. *See* Pet. App. at 68-73 and 74-79. The zoning commission did not appeal from either judgment.

At trial in the present action, the trial court dismissed the respondents' case, not because of a failure to *state a claim*, but rather for failure to make out *a prima facie case* under state rules of practice. This was the evidentiary question that was reversed by the Connecticut Supreme Court.

REASONS FOR DENYING THE WRIT

I. THIS COURT MUST DENY THE PETITION FOR WANT OF JURISDICTION UNDER 28 U.S.C. § 1257.

This Court lacks jurisdiction under 28 U.S.C. § 1257 to consider the question presented because petitioners failed properly to raise it before the Connecticut Supreme Court and the state court did not rule on the issue. It has long been stated that where an issue is not raised and decided in the state court "the appellate jurisdiction fails." *Crowell v. Randell*, 10 Pet. 368, 391 (1836). "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S.

308, 334 (1968) (Harlan, J. dissenting). It is additionally settled practice in this Court that "it is only in exceptional cases, and then only in cases coming from *the Federal courts*, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *McGoldrick v. Compagnie Gen. Transatlantique*, 309 U.S. 430, 434 (1940) (emphasis added). Finally, where the petitioner's failure to argue a constitutional contention in his brief before the state court is considered a waiver of the issue in state court, the argument cannot be entertained in this Court. *Beck v. Washington*, 369 U.S. 541, 553-54 (1962).

The equal protection issue as framed by petitioners in this case was not properly raised at the state level. Petitioners here claim for the first time in their petition for certiorari that malicious and selective treatment of an individual by government officials fails to state a claim under the Equal Protection Clause where the individual is not a member of a suspect class. *See* Pet. br. at i. This claim was not made to either the trial court or to the Connecticut Supreme Court.

At the close of respondents' case in chief, instead of proceeding with a defense, all of the petitioners[1] chose to file a motion to dismiss the respondents' claim not because of a failure to state a legitimate claim under the Equal Protection Clause, but rather for failure to make out a prima facie case under Connecticut Practice Book § 15-8.

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1. At trial and on appeal before the Connecticut Supreme Court various petitioners were represented by different counsel. The individual petitioners, Lewis and Saldibar, were represented by one attorney, and the government petitioners, City of West Haven and West Haven Planning and Zoning Commission, were represented by another. Each group submitted a separate brief in the state Supreme Court.

Pet. App. at 5 n.10. Under the Connecticut Rules of Practice, the motion by petitioners did not test the legal sufficiency of respondents' claim, but only the sufficiency of their evidence. "[W]hen the evidence produced by the plaintiff, if fully believed, would not permit the trier in reason to find the essential issues on the complaint in favor of the plaintiff, dismissal pursuant to Practice Book [§ 15-8] is appropriate." *Hinchliffe v. American Motors Corp.*, 184 Conn. 607, 609, 440 A.2d 810 (1981). In the case at bar, the Connecticut Supreme Court recognized this limitation under the motion made by petitioners when it stated: "On such a motion, the court is confined to determining whether the plaintiff's evidence, if believed and if given the benefit of all favorable inferences, makes out a prima facie case." Pet. App. at 16.

At trial and in their briefs to the Connecticut Supreme Court petitioners argued only that, viewing the evidence in the light most favorable to respondents, the respondents were not similarly situated as other zone change applicants; were not treated differently from other zone change applicants; and were not treated maliciously. Each of these claims was addressed in turn by the Connecticut Supreme Court. *See* Pet. App. at 1-34. Petitioners made no argument in their briefs or at oral argument that the respondents' failed to state a proper equal protection claim because they were not members of a protected class.

Failure of a litigant to follow proper state appellate channels and procedure is fatal to assertion of this Court's jurisdiction. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (petitioner's "attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."); *Beaty v. Richardson*, 276 U.S. 599 (1928) (per curiam)

("Dismissed for want of jurisdiction for the reason that the federal questions sought to be presented were by the record abandoned in the State Supreme Court."). *See also Heath v. Alabama*, 474 U.S. 82, 87 (1985) (declining to consider issue raised for the first time in petition for certiorari and not briefed below); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (same). Petitioners here failed to follow proper appellate procedure under Connecticut state rules.

Connecticut Rule of Appellate Procedure § 60-5 provides that "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court." Because petitioners did not argue to the trial court below that respondents' claim was improperly brought under the rubric of equal protection, and instead argued that respondents' evidence was insufficient, they were precluded from doing so in the Connecticut Supreme Court.

Assuming arguendo that the issue had been properly preserved at the trial level, however, petitioners failed to pursue it with the state Supreme Court, which was not asked to consider and thus never decided the issue. The Connecticut Supreme Court was clear on the question it was to decide and the issues presented to it by all parties: the sufficiency of the "evidentiary showing necessary to establish a prima facie case." Pet. App. at 1. Petitioners had ample opportunity to raise before the Connecticut court the argument they now make to this Court, but they failed to take advantage of that opportunity. This failure is observed in the actions of both groups of petitioners, the individuals and the government entities.

With respect to the individual petitioners, Lewis and Saldibar, the state Supreme Court noted that they initially filed a cross-appeal in this case attempting to raise certain issues, among them qualified immunity, but the cross-appeal was properly dismissed. Pet. App. at 5-6 n.11. The individual petitioners' statement of issues filed with the cross-appeal was then treated as a statement under Connecticut Rule of Appellate Procedure § 63-4(a)(1). *Id.*

Connecticut Rule of Appellate Procedure § 63-4(a)(1) states in relevant part:

> If any appellee wishes to (A) present for review alternate grounds upon which the judgment may be affirmed, [or] (B) present for review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial . . . that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of issues.

Under Connecticut rules, in the absence of a cross-appeal, section 63-4 was the only authority for petitioners to bring up any separate issues. *DiSesa v. Hickey*, 160 Conn. 250, 262-63, 278 A.2d 785, 792 (1971). The individual petitioners failed to brief the issues they raised in their preliminary statement, however, and they were considered abandoned by the state Supreme Court. *See* Pet. App. at 5-6 n.11. The individual petitioners should have included in their preliminary statement to the Connecticut Supreme Court the argument they now make that respondents' failed to state a claim under the Equal Protection Clause because of their class status. Petitioners

did not include that issue in their preliminary statement, nor did they seek to amend the statement to add their present claim as an alternate basis upon which to affirm the Connecticut trial court's decision.

Even if this Court believed petitioners' § 63-4(a)(1) statement could be read to raise the issue they now present, petitioners abandoned that issue just as they abandoned all other issues raised by failing to brief them before the Connecticut Supreme Court. "[I]ssues raised in the defendant's preliminary statement of issues which were not briefed are considered abandoned." *State v. Samaha*, 180 Conn. 565, 565 n.1, 430 A.2d 1290 (1980). *See also* Pet. App. at 5-6 n.11. And not only must the issue be raised, it must also be *adequately* briefed for consideration and decision by the Connecticut Supreme Court. *State v. Prioleau*, 235 Conn. 274, 294-95, 664 A.2d 743 (1995) (refusing to consider an issue stated "in one short paragraph" "with no legal analysis" and "no case citations or other authority to support [the] argument."). The individual petitioners failed to raise the issue in their preliminary statement, and they certainly failed to adequately brief *any* issue raised therein. The Connecticut Supreme Court expressly recognized the state rules of appellate procedure in its decision when it refused to consider the issues in petitioners' preliminary statement and instead considered them to be abandoned. Pet. App. 5-6 n.11. It is clear that had petitioners properly framed and briefed this issue to the Connecticut Supreme Court, that court would have addressed the issue in its decision.

Petitioners City of West Haven and West Haven Planning and Zoning Commission, unlike the individuals Lewis and Saldibar, never bothered even to file

a Rule 63-4(a)(1) statement. The failure of an appellee to file a preliminary statement precludes the appellee from raising any question of law in the Connecticut Supreme Court, especially if the appellant is prejudiced. *State v. Talton*, 209 Conn. 133, 142 n.12, 547 A.2d 543, 548 (1988) (judgment directed for appellant); *Myers v. Manson*, 192 Conn. 383, 398 n.12, 472 A.2d 759, 767-68 (1984); *Lynch v. Davis*, 181 Conn. 434, 437, 435 A.2d 977 (1980); *City Council of City of West Haven v. Hall*, 180 Conn. 243, 247 n.5, 429 A.2d 481, 484 (1980). There can be no doubt but that respondents here were prejudiced by petitioners' failure to raise the issue below for which they now seek this Court's review. Respondents never had an opportunity to defend before the Connecticut Supreme Court the petitioners' present claim and the record certainly was not compiled with that claim in mind. The Connecticut court was never asked to pass on the question.

This Court "will not consider a petitioner's federal claim unless it was either addressed by, or *properly presented to*, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (emphasis added). The petitioners in *Adams*, similar to the petitioners here, had failed under state appellate rules to raise their due process argument in their preliminary statement of issues before the state supreme court. *Id.* at 87-88 n.1. Instead, in their state appellate brief they had raised the issue in a context different from that presented in their petition for certiorari. *Id.* This Court dismissed the writ of certiorari as improvidently granted even though *the respondents* had discussed the due process issue in their state court brief; *id.* at 89; and even though the respondents had failed to raise a timely objection in their opposition to certiorari. *Id.* at 91. The Court noted the need for scrupulous adherence to proper

rules of procedure, even when faced with important issues. "Our continuing interest in an issue, however, does not affect the application of our Rules, because we recognize that by adher[ing] scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect . . . for the Court's adjudicatory process." *Id.* at 92 n.6 (internal citations and quotation marks omitted).

Petitioners here had the burden under United States Supreme Court Rule 14.1(g) to show that the issue sought to be reviewed in this Court was properly presented to the state court. *Adams*, 520 U.S. at 86-87. The Rule requires petitioners to state with specificity the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal question was raised; the method or manner of raising it; and the way in which it was passed on by the state courts. Petitioners have failed to carry their burden, and this Court lacks jurisdiction over the petition. The Connecticut Supreme Court was never asked by petitioners, nor did it consider, whether the respondents' claim was proper under the Equal Protection Clause.

Because all petitioners here failed to raise before the Connecticut Supreme Court the federal issue which they now present, petitioners abandoned this issue and this Court lacks jurisdiction under 28 U.S.C. § 1257. The petition must be denied.

II. THE CONNECTICUT SUPREME COURT'S DECISION INVOLVED ONLY EVIDENTIARY QUESTIONS RATHER THAN PLEADING ISSUES.

Intertwined within the jurisdictional argument made above is the fact that the Connecticut trial court and the Connecticut Supreme Court both ruled on evidentiary questions concerning whether respondents were similarly situated as others and were selectively treated. Petitioners attempt to minimize this fact in their petition for certiorari by making only a passing reference to the way the Connecticut Supreme Court framed the issue before it. *See* Pet. Br. at 8 n.5. Petitioners instead characterize the Connecticut decision as effectively determining the pleading standard for an equal protection claim. *Id.*

The Connecticut Supreme Court made numerous references, however, to the fact that it was only deciding the specific evidentiary question presented of whether there was a sufficient showing for a prima facie case under Connecticut Practice Book § 15-8. The Court's first sentence states, "The dispositive issue in this appeal involves the evidentiary showing necessary to establish a prima facie case of federal equal protection violations against a city, its planning and zoning commission, and certain individuals serving on the commission." Pet. App. at 1. The Connecticut Supreme Court made no ruling concerning the pleadings necessary to state a claim under Equal Protection. Indeed, the Connecticut Supreme Court was free to assume that the pleadings were adequate in light of petitioners' failure to contest them. As argued above, the petitioners only argued to the Connecticut Supreme Court that respondents' evidentiary showing was insufficient; they never argued that respondents had failed to make a sufficient claim under Equal Protection.

Petitioners urge this Court to accept this case because of the recent grant of certiorari in *Village of Willowbrook v. Olech*, 67 U.S.L.W. 3258 (U.S. Sept. 28, 1999) (No. 98-1288). *Willowbrook*, however, is a case coming from a lower federal court and does deal with the sufficiency of the pleadings when stating an equal protection claim. In that case plaintiff's complaint was dismissed by the District Court for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Village of Willowbrook v. Olech*, 160 F.3d 386, 387 (7th Cir. 1998). As this Court recognized in *Adams*, respect for the Court's adjudicatory process and the need to follow the Court's customary limitations on granting certiorari mandate that petitioners strictly comply with procedural requirements despite the Court's "continuing interest in an issue." *Adams*, 520 U.S. at 92 n.6.

Additionally, the Connecticut Supreme Court's evidentiary ruling under Connecticut Practice Book § 15-8 did not make any ultimate findings as to petitioners' liability to respondents. The Court stated that "The court, on such a motion, may not make findings of fact, either favorable or unfavorable to the plaintiff." Pet. App. at 16. For example, concerning the zoning commission's selective treatment of respondents, the Court stated,

> we reiterate that whether the evidence demonstrated that the commission actually required a site plan from other applicants during the requisite time period was not the issue before the trial court on the motion to dismiss, and it is not the issue presented to us. Rather, the issue is whether the evidence presented, viewed in the light most favorable to the plaintiffs, permitted

> the inference that, during the general period of time when the plaintiffs submitted their application, a site plan was not required from those similarly situated to the plaintiffs.

Pet. App. at 21-22.

Although petitioners argue that this case presents "a fully developed factual record" that is better than *Willowbrook* to consider the equal protection issues; Pet. br. at 9; the procedural posture here and the differences between dismissal under F. R. Civ. P. 12(b)(6) and Connecticut Practice Book § 15-8 show that the two cases are not as similar as petitioners suggest and this case does not necessarily present a better record for review. First, petitioners did not contest the validity of respondents' equal protection claim. Second, as the Connecticut Supreme Court stated, the analysis under § 15-8 involves no findings of fact. Pet. App. at 16. Therefore, although this case did proceed farther in the litigation process than *Willowbrook*, the factual record is not fully developed. More of a record is not ipso facto a better record. Similarly, the petitioners never offered a defense to the equal protection claim. Had petitioners gone forward with defense of the case and offered rebuttal to respondents' claim, they might have prevailed in any event.

III. THE CONNECTICUT SUPREME COURT'S DECISION FAILS TO PRESENT THE FACTUAL PREDICATE NECESSARY TO RESOLVE PETITIONERS' POSED QUESTION CONCERNING MUNICIPAL POLICY.

Petitioners' second question presented to this Court concerning municipal policy fails to merit granting the

petition for certiorari. Despite petitioners' efforts to raise a conflict with other decisions concerning municipal policy, the case at bar fails to present a vehicle for resolution of the question posed by petitioners, and contrary to petitioners' assertions, the Connecticut Supreme Court followed this Court's well-established principles in this area of the law to resolve the evidentiary questions presented.

Petitioners first mischaracterize the holding of the Connecticut Supreme Court by erroneously stating that

> the Connecticut Supreme Court held that the personal animus of two commission members established a municipal policy of the City of West Haven sufficient to impose liability under 42 U.S.C. § 1983, even though the commission's denial of respondents' zone change application was unanimous, and even though the allegedly tainted members recused themselves from the vote.

Pet. at 10. The Court did not hold, however, that a municipal policy was derived solely from the actions of two members of the commission at a single hearing in which they recused themselves.

Rather, the Connecticut Supreme Court repeatedly asserted that it was determining the evidentiary question of whether the actions of Lewis and Saldibar constituted selective treatment of respondents and whether those actions could be inferred to have affected the rest of the zoning commission on two different occasions. After an extensive review of the evidence, the court stated: "We conclude that the evidence previously discussed, regarding how Lewis and

Saldibar, prominent members of the commission, acted toward plaintiffs *throughout the course of the zone change application review process*, would support the inference that their conduct influenced the votes of the other commissioners." Pet. App. at 28 (emphasis added). This holding was consistent with this Court's precedent that § 1983 liability is read against the background that one is responsible for the natural consequences of one's actions. *See Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986). *See also* Pet. App. at 27-28. It also demonstrates that the Connecticut Supreme Court reviewed the proceedings before the zoning commission in their entirety, rather than simply the events at a single hearing.

The holding does not purport to stand for the proposition that the unconstitutional motives of a minority of members of a public body automatically creates municipal liability based on policy. Nor does it even address the issue of how many members must possess constitutionally impermissible motives. The Court merely held that, based on the evidence presented in this case, an inference could be made that the entire commission was affected by Lewis and Saldibar, and thus there was a *prima facie* case that the two denials of respondents' application by the commission occurred with impermissible motive.

Having determined that the evidence permitted the inference that Lewis and Saldibar affected the entire zoning commission, the Connecticut Supreme Court next addressed whether the actions of the entire commission, as well as Lewis and Saldibar, constituted a municipal policy. The Connecticut court again followed this Court's well-established principles in doing so.

After discussing the requirements for municipal liability set out in *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), *Pembauer v. Cincinnati*, 475 U.S. 469 (1986), and *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Connecticut Supreme Court noted that petitioners had conceded that they were policymakers and also conceded that three of the four guidelines for a municipal policy identified by Justice Brennan in *Pembauer* were met. *See* Pet. App. at 30-31. Once again, the Connecticut Supreme Court was faced with an evidentiary question: whether there was sufficient evidence to support a finding of the fourth *Pembauer* requirement. Pet. App. at 31.

It is important to note that whether the petitioners were final policymakers is an issue of *state* law. *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997). The Connecticut Supreme Court analyzed the state zoning statutes and the local zoning regulations and found "there is no question that, at least for the purposes of establishing a prima facie case, the inference can be drawn that *the commission* acted as a policy maker for the city with regard to denying the plaintiffs' zone change application." Pet. App. at 33 n.26 (emphasis added). The court properly looked to this Court's recent decision in *Board of County Commissioners v. Brown*, 520 U.S. 397, 405 (1997), for the proposition that where an authorized decisionmaker intentionally deprives a plaintiff of constitutionally protected rights, municipal culpability is established. *See* Pet. App. at 31-33. The Connecticut Supreme Court concluded "that the evidence supports the inference that *the actions of the commission*, with regard to its consideration of the plaintiff's zone change application, constituted a municipal policy of the city, and that, therefore, the plaintiffs had established a prima facie case against the city and the commission." *See* Pet. App. at 29 (emphasis added).

It is also worth noting that when respondents appealed the two decisions of the zoning commission to the Connecticut trial court prior to bringing the present case, the court sustained both appeals and found in both instances that the *entire zoning commission* had acted with predisposition, predetermination and bias. *See* Memorandum of Decision dated June 22, 1988 of Flanagan, J., Pet. App. at 73; Memorandum of Decision dated January 9, 1987 of Schimelman, J., Pet. App. at 77-78. The zoning commission did not appeal from either decision. While not necessarily dispositive of the constitutional violation alleged in this case, the two prior findings, if not binding as collateral estoppel, are at the least persuasive evidence that a trier of fact could infer a *prima facie* case from the evidence presented. Thus, the Connecticut Supreme Court's decision that the evidence permitted an inference that the entire commission acted illegally was correct and consistent with earlier lower court proceedings.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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